Supreme Court, U.S.
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No. 03-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2003

ROGER BRASS,
Petitioner,

vs.

COUNTY OF LOS ANGELES,
RICK THURLO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
ATTORNEYS FOR PETITIONER
3435 Wilshire Boulevard, Ste. 2900
Los Angeles, CA 90010
(213) 252-9444

50 pp

QUESTION PRESENTED

Did the routine jail procedures which caused the incarceration of petitioner for 39 hours following a court's order for his release deprive him of a constitutionally protected interest? *Compare Brass v. County of Los Angeles*, 328 F.3d 1192 (9th Cir. 2003) (39-hour delay constitutional), *with Lewis v. O'Grady*, 853 F.2d 1366 (7th Cir. 1988) (delay of six to eight hours may violate the Constitution).

LIST OF PARTIES

Petitioner Roger Brass was the plaintiff and appellant in the courts below. The County of Los Angeles, a political subdivision of the State of California, was a defendant and appellee in the courts below. Ri Thurlo, an Los Angeles County Deputy Sheriff, was a defendant and appellee in the courts below; petitioner does not seek review of his claim against Thurlo.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2003

ROGER BRASS,
Petitioner,

vs.

COUNTY OF LOS ANGELES,
Respondent.

Petitioner Roger Brass respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed May 15, 2003.

OPINION BELOW

The opinion of the Court of Appeals is reported at 328 F.3d 1192 (9th Cir. 2003). It appears in the Appendix [hereinafter "Apx."] as Appendix A. No opinion was rendered by the Central District of California; its judgment appears as Appendix C.

JURISDICTION

The Court of Appeals' judgment was filed on May 15, 2003. Apx. A1. That court denied a timely petition for rehearing and suggestion for rehearing *en banc* July 1, 2003. Apx. B1. This petition for certiorari was filed within 90 days of July 1, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV, sec. 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42:

§ 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. The Facts.

On April 6, 1997, the Los Angeles County Sheriff's Department arrested petitioner, Roger Brass, thinking he was one James Nichols, the subject of an arrest warrant. Later that day the Sheriff's Department determined that Mr. Brass was not Mr. Nichols, but nevertheless held him in the Los Angeles County Jail until the first scheduled court appearance. On April 9, 1997, at 11:20 a.m., the judge found that the warrant was for another person and ordered Mr. Brass released. Apx. A2. Although there was no longer any legal justification to incarcerate Mr. Brass, Los Angeles County did not release him from the jail until April 11, 1997, at 3:00 a.m., 39 hours after the court ordered his release. Apx. A2-A3.

As it did with virtually everyone ordered released from its jail, the Sheriff's Department delayed Mr. Brass' administrative release process while it updated data in its computer system. This policy was explained in another case of alleged over detention arising from the Los Angeles County Jail:

> Before an inmate is released from prison, the LASD [Los Angeles Sheriff's Department] conducts a check of the Automated Justice Information System ("AJIS"), a computerized law enforcement database, to confirm that the prisoner is not wanted by any other law enforcement agency. It is the LASD's policy, however, to run the AJIS check only after all wants and holds that arrive on the day a prisoner is scheduled for release are inputted into the database. Due to the high volume of wants and holds received each day, the inputting process can, and often does, take between one to

> two days to complete. It is only after the inputting process is complete and the computer check run, that the LASD begins the administrative steps toward a prisoner's release. Although no longer required to serve time, these prisoners must remain in jail during the inputting period, extending their incarceration beyond their release date.

Streit v. County of Los Angeles, 236 F.3d 552, 556 (9th Cir.), *cert. denied* 534 U.S. 823 (2001); *see also* Apx. A11-A10 (*quoting Streit*).[1]

The Los Angeles County Sheriff's Department receives 3,000 to 5,000 documents daily relating to people in its jails. Reading and entering information from these documents into the AJIS computer system can take as long as several days for each day's batch of documents. Apx. A11-A12. In other words, for the 300 to 600 people entitled to release on a particular day, Apx. A11, the Department did not begin the release processing until after some 3,000 to 5,000 documents received the same day, but concerning inmates not entitled to release, were entered into AJIS. Apx. A11-12.

Once started (that is, after the day's batch of 3,000 to 5,000 documents had been read and entered into the computer system) the administrative release process for a release-eligible inmate takes, on average, about six hours. AER[2] 282-83; AER 282-83, 290-308. Thus,

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[1] *Streit* was part of complex class action litigation challenging Los Angeles County's delayed release procedures and its strip searching of inmates ordered released. Counsel for petitioner were among the counsel for plaintiffs in that litigation. The matter was resolved by settlement, which included payment of $27 million, in part to compensate people whose releases were delayed unreasonably, and injunctive changes which eliminated the cause of delay for Mr. Brass' release.

[2] "AER" refers to Appellant's Excerpts of Record filed in the Ninth Circuit.

Mr. Brass' release was delayed about 33 hours while the computer database was being updated.

B. The District Court Proceedings.

Mr. Brass filed a suit for damages under 42 U.S.C. § 1983 in the United States District Court for the Central District of California, alleging, among other things, that the County of Los Angeles' holding him for 39 hours after the state trial court ordered his release violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. Apx. A1. On the parties' cross-motions for summary judgment, the district court granted judgment in defendants' favor. Citing *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), in which this Court held that incarceration in excess of 48 hours *before* judicial determination of probable cause violates the Fourth Amendment, the court upheld Mr. Brass' additional 39 hour detention *following* a judicial determination that no probable cause existed. Apx. C9-C12.

C. The Ninth Circuit's Decision.

The Ninth Circuit panel affirmed the lower court's decision on the ground that Mr. Brass had not stated a constitutional violation. Although acknowledging that Brass "*may* have had a due process right to be released within a reasonable time after the reason for his detention ended," Apx. A13 (emphasis added), the panel concluded that 39 hours was *per se* reasonable. "Brass did not have a constitutional right to have his release papers processed in any particular order or ahead of other prisoners whose papers the Sheriff's Department received the same day as his." Apx. A13.[3] The

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[3] The panel decision incorrectly describes Mr. Brass' claim. He never claimed his release had priority; he claimed the Department should not delay processing all releases — including his own — to process paperwork for people *not entitled to release*. Moreover, the panel decision incorrectly suggests that the entire 39 hours Mr. Brass spent in custody after the court ordered him released from jail was devoted to the release process. Apx. A12 ("It generally takes from twenty-four to forty-eight

Ninth Circuit panel rested its conclusion on this Court's decision in *Baker v. McCollan*, 443 U.S. 137 (1979), believing that the facts there were apparently analogous to those here. Apx. A14-A15.

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hours to process an inmate's release."). The release process takes about six hours after the computer is updated. See footnote 5, *infra*.

REASONS FOR GRANTING WRIT

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT MATTER.

The Court should grant this petition because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." U.S. Supreme Ct. R. 10(a).

There is now a conflict within the circuits on how long someone can be held in jail after a court ordered release. In *Brass*, the Ninth Circuit held as a matter of law that following a court's order directing a person's release, the jailer may continue incarceration for anther 39 hours without depriving that person of any liberty interest. On the other hand, the Seventh Circuit held in *Lewis v. O'Grady*, 853 F.2d 1366 (7th Cir. 1988), that a delay of six to eight hours could be found unconstitutional by a jury, depending on the circumstances.

The Seventh Circuit explained the basis for its ruling as follows:

> We recognize that the administrative tasks incident to a release of a prisoner from custody may require some time to accomplish — in this case perhaps a number of hours. Reasonable time must be allowed for such matters as transportation, identity verification, and processing. It is virtually impossible to establish an absolute minimum time to meet all potential circumstances which might exist. What is a reasonable time for detaining a prisoner in custody is a question best left open for

> juries to answer based on the facts presented in each case. In the instant case, a reasonable jury could find that the "administrative" delay in Lewis' release was unreasonable.

Id. at 1370.[4]

The legal issue at stake is important within the meaning of Rule 10 because of the significant number of people directly affected by it on a daily basis. Large metropolitan jails in the United States release tens of thousands of people from custody every court day. Generally speaking, these are not people suspected of serious, violent crimes because those inmates are usually transferred from county jails to state prison systems. The issue here involves only people released directly to the streets, people in which the government has no interest in continued incarceration.

Petitioner acknowledges the common sense proposition that once the court ordered his release, his jailer needed a reasonable amount of time to complete the administrative steps to carry out that order. His identity needed to be checked, his records reviewed for other cases, his property returned, and so forth. What Mr. Brass challenges is his jailer's decision to delay initiating, by some *30 hours*, an administrative release process that should, at the outside, take no more than six to eight hours.[5] A person ordered released by

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[4] Like Roger Brass, Sandy Lewis was arrested on a warrant for another person. The court ordered Mr. Lewis' release sometime after 1:30 p.m., and at about 10:00 p.m. the jail released him. The trial court found the delay reasonable as a matter of law; the Seventh Circuit reversed. 853 F.2d at 1367-68.

[5] Once the administrative release process is started (that is, after the day's batch of 3,000 to 5,000 documents had been read and entered into the computer system) it takes, on average, about six hours to release a release-eligible inmate:

> Q: In the release process the person is called for release, a person is in a cell someplace, in a dormitory someplace, and a deputy would go to that person and say roll 'em up, correct?

a court should have the administrative release process begin promptly; delaying the commencement of that process for one or two days deprives the person to be released of liberty without due process of law.

Accordingly, petitioner urges this Court to grant his petition for certiorari and make this basic principle the law of the land.

A: Uh-huh.

Q: And that begins the release process; is that right?

A: That's part of it, yes.

Q: How long on average would it take at the time that you left IRC [Inmate Reception Center] from the point in time where the person was called for release until the point in time that the person actually walked out the door?

. . .

The witness: It depends on the facility, if they were housed at NCCF, CJ, or Twin Towers.

Q: Housed at Twin Towers.

A: Once the release process starts, then there are several things that occur.

Q: Right. I know –

A: A pass is sent for the inmate –

Mr. MacLatchie: He's just asking for an average time if you're capable of giving him an average.

The witness: Four to six hours.

Testimony of Sheriff's Department Captain Betkey, 105:4-106:6 (AER 282-83). See also testimony of Sheriff's Department Lt. Timothy Cornell (AER 282-83, 290-308,) (actual release process should be concluded in no more than about six hours).

II. REVIEW IS NECESSARY TO DETERMINE WHETHER A PUBLIC OFFICIAL MAY ARBITRARILY DELAY INITIATION OF A PERSON'S RELEASE PROCESS.

Freedom from physical restraint or confinement in the absence of lawful authority "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) ("the paradigmatic liberty interest under the due process clause is freedom from incarceration"). When the government's lawful authority to detain an individual ends, continued detention violates the Fourteenth Amendment. *See McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972).

The issue this case presents is whether a jail may routinely delay commencing the release process one or two days for its own convenience. Petitioner's position is simple. Such a delay is not reasonable and constitutes both an unreasonable seizure under the Fourth Amendment and a deprivation of liberty without due process of law under the Fourteenth Amendment.

Neither of the High Court authorities cited by the Ninth Circuit tend to support its decision in any manner.

Baker v. McCollan, 443 U.S. 137 (1979), did not resolve, or even address, the issue presented here.[6] That case challenged the

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[6] In *Baker*, the police arrested a man named McCollan pursuant to warrant issued for McCollan. Although a mistake had been made, the arresting officers "understandably concluded that they had their man." 443 U.S. at 141. There was "no suggestion that respondent's arrest was constitutionally deficient." *Id.* at 143. The Court held that the Due Process Clause did not require defendant to investigate McCollan's complaint that he was not the right "McCollan" during "three days over a New Year's weekend." *Id.* at 145.

propriety of police actions taken *before* a judicial determination of whether the arrestee was being properly held on an arrest warrant, not the constitutionality of holding someone for two days *after* a court determination that he was the wrong person. Petitioner submits that police authority to detain is far more limited where, unlike in *Baker*, a court *tells* the police no lawful basis for continued incarceration exists. There is simply nothing in *Baker* that says a jail may needlessly delay commencing — by more than 30 hours — a release-eligible person's six-hour release process.

Equally troubling is the Ninth Circuit's citation of *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), and the suggestion that the case supported panel's conclusion. Apx. A16-A18. In that landmark ruling, the Court settled the troubling question of how long a police agency may incarcerate a person arrested without a warrant and without a judicial determination of probable cause by drawing a somewhat arbitrary forty-eight hour rule as the outside limit. 500 U.S. at 57. In *Brass*, for all practical purposes the Ninth Circuit has doubled *McLaughlin's* 48-hour limit — 48 hours from the time of arrest until the judicial determination of probable cause and, if no probable cause is found, *another* 48 hours to carry out the release order.

One might ask, how beneficial is a "bright-line" rule assuring a judicial determination of probable cause within 48 hours, in the absence of a similar rule assuring a prompt release from custody following a court-ordered release? This case provides the ideal vehicle for fashioning such a rule.

Just as it did in *McLaughlin*, the Court can strike the appropriate balance between the competing interests at stake. It can provide a reasonable time for jails to carry out the administrative steps incident to releasing someone from jail — here, about six hours (see note 5 *supra*) but not 39 or 48 hours — and deem releases

within that time presumptively constitutional. If the release falls beyond the boundary, however, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Id.* at 57.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
JOHN BURTON
Attorneys for Petitioner

ROGER BRASS, Plaintiff-Appellant, v. COUNTY OF LOS ANGELES, erroneously sued as Los Angeles County Board of Supervisors; RICK THURLO, individually and as a peace officer, Defendants-Appellees.

No. 01-57249

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

January 17, 2003, Argued and Submitted, Pasadena, California
May 15, 2003, Filed

COUNSEL: Thomas E. Beck, Los Angeles, California, for the plaintiff-appellant.

David J. Wilson, Los Angeles, California; Denise M. Walter, Julie Fleming, Los Angeles, California, for the defendants-appellees.

JUDGES: Before: Daniel M. Friedman,* Alex Kozinski, and Johnnie B. Rawlinson, Circuit Judges. Opinion by Judge Friedman.

OPINION:

FRIEDMAN, Circuit Judge:

The appellant Roger Brass challenges the district court's order granting summary judgment in favor of the County of Los Angeles ("County") on his complaint that the County violated 42 U.S.C. § 1983 by continuing his incarceration for 39 hours after a state trial judge had ordered him released. We affirm.

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* Daniel M. Friedman, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

I

A. The relevant facts are undisputed. County Sheriff Deputy Thurlo was seeking to arrest James Nichols on a warrant for vehicular burglary. Brass's house was shown in the warrant as Nichols's address. Nichols reportedly had been seen near the house. Brass resembled Nichols's physical description, and both men had missing left-hand finger joints. On Sunday, April 6, 1997, Thurlo arrested and incarcerated Brass in the mistaken belief that he was Nichols.

Later that day, after Thurlo had left the station house, it was determined that Brass was not Nichols. The Sheriff's Department, however, continued to hold Brass and did not present him for arraignment until April 9, 1997, when, at 11:20 a.m., a state court judge ordered him released. The order, on a printed form, was directed to the County Sheriff, and stated in pertinent part:

> THIS IS TO AUTHORIZE YOU TO RELEASE Brass, Roger . . . FROM CUSTODY FOR THE FOLLOWING REASON Released on O/R, This Case Only.

The court's docket covering a case against Nichols further stated: "Request to Release on OR granted. Respondent released on own recognizance . . . return on above date to be fingerprinted. Court indicates this may not be defendant in custody."

Although Brass stated in his brief that the order directed that he be released "forthwith," neither the release order nor the docket entries specified any time limit for his release.

Brass was released 39 hours after the release order was entered, at 3:00 a.m. on Friday, April 11. This 39-hour period for

effecting his release is the gravamen of the case now before us.

B. Brass filed a suit for damages in the United States District Court for the Central District of California, naming as defendants the County, Thurlo and "DOES 2 through 100." His amended complaint contained six counts. The first three were federal claims, all alleging violation of 42 U.S.C. § 1983. Count I charged all the defendants with depriving Brass of his liberty without due process and alleged that the "conduct . . . was undertaken pursuant to the policies, practices and customs of the Los Angeles Sheriff's Department." Count II alleged that the defendants had subjected him to unreasonable searches and seizures, in violation of the Fourth Amendment. Count III, which charged only the County, alleged that Thurlo and the DOES had enforced the County's "policies, customs, practices and usages in violation of the Fourth and Fourteenth Amendments." (This claim will be referred to as the *Monell* claim, as the parties do, based on *Monell v. Department of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), discussed in Part III, below.) The fourth through sixth counts all stated claims under California law. The complaint stated that each DOE defendant "is responsible in some manner for the events and happenings herein referred to, and thereby proximately caused injuries and damages as herein alleged"; and that Brass did not know the DOES' "true names and capacities," but would seek to amend the complaint "to show their true names and capacities when same have been ascertained."

On the defendants' motion, the district court granted summary judgment dismissing the three federal claims and, declining to exercise supplemental jurisdiction, dismissed the state law claims without prejudice. The court dismissed the first claim against Thurlo because Brass had not shown that Thurlo was responsible for his continued detention after the state court had ordered his release. The court rejected Brass's unlawful arrest claim (Count II) because Thurlo had probable cause to arrest him, and therefore was entitled

to qualified immunity. The court also dismissed Counts I and II against the County because the County could not be held liable under Section 1983 on a *respondeat superior* liability theory. Finally, the court granted summary judgment dismissing Count III, the *Monell* claim that the 39-hour detention resulted from a County policy or custom, on the ground that the County Sheriff acted as a state rather than as a county official in handling the release of prisoners.

On appeal, we affirmed the summary judgment in favor of Thurlo, but reversed the judgment in favor of the County. *Brass v. County of L.A.*, 10 Fed. Appx. 412, No. 99-55570 (9th Cir. Mar. 19, 2001) (unpublished opinion). We held that Thurlo had probable cause to arrest Brass, and therefore qualified immunity. With respect to Brass's claim that the County "violated his constitutional rights when it failed to release him from jail until April 11, even though a judge ordered his release on April 9," we relied on our decision in *Streit v. County of Los Angeles*, 236 F.3d 552, 561 (9th Cir. 2001), where we held that "when the Sheriff of Los Angeles County performs the function of 'oversight and management of the local jail,' including, specifically, the effectuation of the release of prisoners, the 'Sheriff acts for the County,' and not the state . . . . As a result, the County can be liable for Brass's delayed release and, therefore, the district court's summary judgment for the County must be reversed. We express no opinion on the merits of Brass' claim of untimely release." *Id.* at *3-5 (*quoting Streit*, 236 F.3d at 561).

C. On the remand, Brass moved for summary adjudication, and the County moved for summary judgment. In support of his motion, Brass asserted, in addition to his "policy or custom" claim against the County, "three additional bases to support his Section 1983 action," including the County's failure to arraign him timely. Brass previously had not explicitly made these three additional claims.

Brass also attempted to substitute four named County police officers for four of the DOES. Those officers allegedly had been involved in his 39-hour incarceration. He did not, however, move to amend his complaint to add those individuals as named defendants, but merely referred to them as defendants in various documents he filed.

The district court denied Brass's motion, granted the defendant's motion and dismissed the case. The court first held that the only issue properly before it was Brass's *Monell* claim against the County. It pointed out that it had initially granted summary judgment in favor of both Thurlo and the County; that we reversed only the ruling that the County was not liable on the *Monell* claim because the Sheriff acted as a representative of the state and not the County in handling the release of prisoners "thus leaving intact [its] findings that the County was not liable under Plaintiff's first two Section 1983 causes of action (for due process violations and unlawful arrest)"; and concluded therefore that the Monell claim "is the only viable federal claim before [it]." The district court then ruled that, because Brass had not previously "asserted" the additional claims he now sought to litigate, he had waived them.

Finally, the court held that it would be "inappropriate" to substitute the four named parties for the four DOE defendants, "especially" because Brass "has not even attempted to request leave from the Court to add new parties or to file an amended complaint. Plaintiff cannot take advantage of the Ninth Circuit's limited remand by now adding these new individuals to the litigation. Thus, the naming of these individuals as defendants and any allegations pertaining to them as named defendants are stricken."

The court denied Brass's motion for summary adjudication in his favor that the County violated his constitutional rights through its practice and custom of delaying his release for 39 hours "because

he has failed to carry his burden of showing that this policy was actually applied to him in the instant case. Mere conclusory statements that this practice 'caused [his] detention,' without more, does not constitute evidence sufficient to establish a nexus between the 'policy' and Plaintiff's detention." The court concluded: "Because Plaintiff's 39-hour detention is within the presumptive constitutional time limit of 48-hours set by the McLaughlin court [discussed below] and because Plaintiff has not raised a genuine issue of material fact that his release was otherwise unreasonably delayed, Defendants' motion on Plaintiff's sole remaining Section 1983 cause of action alleging Fourth and Fourteenth amendment violations for overdetention is GRANTED."

Finally, the court again dismissed without prejudice Brass's state law claims.

II

The district court correctly held that the only issue properly before it was the validity of Brass's *Monell* claim against the County.

A. As noted, Brass's amended complaint contained three federal law counts. Count I charged all defendants (the County, Thurlo, and the DOES) with depriving Brass of his liberty without due process of law "pursuant to the policies, practices and customs" of the County's Sheriff's Department, and Count II, also directed against all the defendants, with subjecting him to unreasonable searches and seizures. Count III, which set forth the *Monell* claim, was asserted only against the County, and alleged that the County employees enforced against Brass County "policies, customs, practices and usages in violation of the Fourth and Fourteenth Amendments." The district court granted summary judgment dismissing these three counts.

In the prior appeal, we held that Thurlo had probable cause to arrest Brass and that he therefore "ha[d] qualified immunity and is not liable for the arrest under 42 U.S.C. § 1983." *Brass*, 10 Fed. Appx. 412, No. 99-55570, at *3 (unpublished opinion). We affirmed the district court's summary judgment in favor of Thurlo. Id. at *5. We reversed the summary judgment in favor of the County, however, because it was based on the erroneous ground that the Sheriff [**10] acted for the state in handling the release of prisoners. We held that in performing those duties the Sheriff acted for the County, which "can be liable for Brass's delayed release." Id. at *4.

Since Claims I and II were asserted against both the individual defendants and the County, with only Claim III solely against the County, it would appear that on the remand all three claims were extant against the County. In fact, however, only Count III -- the *Monell* count -- remained viable.

As we explain in Part III A, below, the only basis upon which a valid claim under § 1983 may be asserted against the County is under the "policy or custom" theory of *Monell*. Claim III states the *Monell* theory. Although Count I, which alleges the defendants denied Brass his liberty without due process, states that the defendants' conduct "was undertaken pursuant to the policies, practices and customs of the Los Angeles Sheriff's Department," the only "policies, practices and customs" upon which Brass's claims are based are those relating to the way in which prisoners are released from confinement. See below Part III B.

Thus, the claims against the County in Count I are based upon the same facts and theories as Count III. Count II, which apparently contends that Brass's arrest violated his Fourth Amendment right to be free from unreasonable searches and seizures, does not contend that the arrest was made pursuant to the County's policy or custom. Moreover, we rejected that claim in the

prior appeal when we held that Thurlo had probable cause for the arrest.

In sum, only the *Monell* theory in Count III remained in the remanded case.

B. The district court also properly refused to permit Brass to assert the three additional arguments he sought to raise in support of his § 1983 claim. He contended that the County had denied him due process by failing (1) to arraign him promptly after his arrest, (2) to release him promptly after determining that he was not Nichols and (3) to comply with a state court injunction in another case that allegedly prohibited the practices the County followed in releasing him. The district court held that because Brass had not asserted those claims in the earlier stages of this litigation, either before it or on appeal, he had waived them.

We agree. Nothing in Counts I-III of the amended complaint even suggests that Brass was raising those issues. Furthermore, Brass has offered no excuse or justification for his failure to raise them earlier. HN1The decision whether to permit such a belated attempt to expand a complaint lies within the discretion of the district court. See *Chodos v. W. Publ'g*, 292 F.3d 992, 1003 (9th Cir. 2002). The district court did not abuse its discretion in refusing to allow Brass thus to broaden his case.

C. Finally, the district court did not err in refusing to permit Brass to substitute four individual members of the Sheriff's Department for four of the DOES in his amended complaint. In that complaint he stated that when the "true names and capacities" of the DOES, which he then did not know, were ascertained, he "will seek leave to amend th[e] Complaint" to name them. In refusing to permit the addition of those individual defendants, the district court pointed out that Brass "has not even attempted to request leave from the

Court to add new parties or to file an amended complaint. Plaintiff cannot take advantage of the Ninth Circuit's limited remand by now adding these new individuals to the litigation." The district court did not abuse its discretion in precluding Brass from thus expanding his suit. See *Percy v. San Francisco Gen. Hosp.*, 841 F.2d 975, 978 (9th Cir. 1988).

III

A. Brass's "policy or custom" claim is based upon *Monell v. Department of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). In *Monroe v. Pape*, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961), the Supreme Court held that municipal corporations were not subject to liability under § 1983. In *Monell*, 436 U.S. at 665, the Court, based upon its "fresh" review of the legislative history of the Civil Rights Act of 1871 (the statutory predecessor to § 1983), " overrule[d] *Monroe v. Pape* . . . insofar as it holds that local governments are wholly immune from suit under § 1983." *Id.* at 663 (footnote omitted). The Court, however, upheld *Monroe* "insofar as it holds that the doctrine of respondeat superior is not a basis for rendering municipalities liable under § 1983 for the constitutional torts of their employees." Id. at 663 n.7. It stated that "the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691.

It announced the following standard governing the liability of a municipality under § 1983:

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a

> government's policy or custom, whether made by its law-makers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694. Although *Monell* dealt with a municipal government's liability under § 1983, the standard there announced was more broadly framed in terms of "a local government." Both the Supreme Court and we have recognized that HN3the *Monell* standard governs a county's § 1983 liability. *McMillian v. Monroe County*, 520 U.S. 781, 783, 138 L. Ed. 2d 1, 117 S. Ct. 1734 (1997); *Streit*, 236 F.3d at 564.

B. The "policy or custom" of the County upon which Brass primarily bases his § 1983 claim is that it processes releases of prisoners pursuant to court order only after it has completed the processing of all other inmates scheduled for release on that day. He also appears to challenge the County's practice of not beginning the processing of releases until all information relating to the prisoners scheduled for release on a particular day has been received and entered into the computer system. Most of the discussion that follows, although framed in terms of his main contention, also covers his secondary argument.

To evaluate the argument, it is necessary to consider how the County generally handles the release of its prisoners.

In *Streit*, we described the Sheriff's Department's practice in releasing inmates as follows:

> the LASD [Sheriff's Department] conducts a check of . . . a computerized law enforcement database[ ] to confirm that the prisoner is not wanted by any

> other law enforcement agency. It is the LASD's policy, however, to run the . . . check only after all wants and holds that arrive on the day a prisoner is scheduled for release are inputted into the database. Due to the high volume of wants and holds received each day, the inputting process can, and often does, take between one to two days to complete. It is only after the inputting process is complete and the computer check run, that the LASD begins the administrative steps toward a prisoner's release. Although no longer required to serve time, these prisoners must remain in jail during the inputting period, extending their incarceration beyond their release date.

Streit, 236 F.3d at 556.

The Inmate Reception Center of the Los Angeles County Sheriff's Department ("Sheriff's Department") processes all inmate entrances and releases for the County. Decl. of Lt. Sneed of Sheriff's Dep't P 2. The Sheriff's Custody Division operates the jails, and books and releases close to 600 inmates per day, an average of more than 200,000 inmates annually. *Id.* P 3. Many inmates in the County jail system are repeat and/or serious offenders. *Id.* P 4. Law enforcement and other government agencies frequently ask the Inmate Reception Center to place "holds" on a particular inmate's release. *Id.* Upon receipt, these holds are processed and put into the jail computer system. *Id.* The system is updated continually, with the largest amount of information from the courts arriving at the end of the day. *Id.*

The Inmate Reception Center receives from the forty-two courts in the County 3,000 to 5,000 documents daily. *Id.* P 5. Each document is read individually, routed and entered into the computer

system, approximately seventy clerks work day and night on this task. *Id.* Before releasing an inmate, the Sheriff's Department makes a record check that includes a review of all "wants" and "holds" received on a prisoner's scheduled release date. *Id.* P 7.

The Sheriff's Custody Division does not authorize an inmate's release "until each and every piece of paper received from all the courts countywide has been interpreted, routed, and inputted into AJIS [the Automated Justice Information System]" and a check is made to determine there are no wants or holds precluding release. *Id.* P 7. Inmates are released from the Central Jail; those detained elsewhere are transferred to the Central Jail for release. *Id.* P 8. It generally takes from twenty-four to forty-eight hours to process an inmate's release. *Id.* P 8. On those rare occasions when a judge orders an inmate released "directly from court," however, the inmate is so released after phone contact with the Inmate Reception Center. *Id.* P 9.

Brass challenges the order in which releases are processed. He complains that the Sheriff's Department processes judicially-ordered releases at the end of the processing day, only after it has processed all other releases, i.e., prisoners who have completed their sentences or whom the Sheriff's Department has determined administratively should be released.

We have defined broadly "policy" for purposes of a *Monell* claim as "a deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir. 2002) (per curiam) (citation and internal quotation marks omitted). The County does not question that its processing of court-ordered releases at the end of the processing day constitutes a "policy or custom" under *Monell*. Assuming without deciding that is so, we

agree with the district court that Brass has not stated a valid claim under § 1983 because that "policy or custom" did not violate Brass's constitutional rights.

What Brass is raising is an issue of priority: he challenges the order in which the Sheriff's Department processes prisoners for release. To whatever extent he could establish that his release should have been effectuated before that of other prisoners, their release correspondingly would have been delayed. Moreover, even if Brass could prevail in his contention that his release should have been processed earlier on his release date, the result would have been only to shorten the 39-hour delay in releasing him. It could not have eliminated the delay; it would have reduced it by an indeterminable amount dependant upon where in the processing chain he was reached.

Brass may have had a due process right to be released within a reasonable time after the reason for his detention ended. See *Baker v. McCollan*, 443 U.S. 137, 144-46, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979); *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) (citation omitted) individual has a liberty interest in being free from incarceration absent a criminal conviction."). The question here, however, is whether the County denied him that right because its policy or custom of processing court-ordered releases only after it has processed all other releases increased by an indeterminate amount the delay between the court order and his actual release.

Brass did not have a constitutional right to have his release papers processed in any particular order or ahead of other prisoners whose papers the Sheriff's Department received the same day as his. The order in which the Sheriff's Department handles prisoner releases is an administrative matter primarily within the Department's discretion. We know of no requirement, constitutional or otherwise, that the Department process release papers in the

precise order in which it receives them, or process court-ordered releases ahead of all others. In these circumstances, we cannot say that to the extent that the 39-hour delay in releasing Brass resulted from that policy or custom, it violated his constitutional right to due process of law.

Our conclusion finds support in *Baker*, 443 U.S. 137, 61 L. Ed. 2d 433, 99 S. Ct. 2689. There, as here, a man was arrested on a valid warrant in the mistaken belief that he was the person described in the warrant. *Id.* at 141. He was imprisoned for seventy-two hours over a weekend. *Id.* When county officials became aware thereafter of the mistaken identity, the plaintiff was released. *Id.* He then sued the Sheriff under § 1983 for deprivation of liberty without due process of law. *Id.*

The Supreme Court held that because *McCollan* had "been deprived of no rights secured under the United States Constitution, respondent had no claim cognizable under § 1983." *Baker*, 443 U.S. at 146-47. The Court stated that "a public official is liable under § 1983 only if he causes the plaintiff to be subjected to deprivation of his constitutional rights," *Id.* at 142 (citation and internal quotation marks omitted), and that "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Id.* at 146. The Court held that the deprivation of liberty McCollan suffered because of his imprisonment did not deny him due process of law because:

> A reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers -- all of whom may be potential defendants in a § 1983 action -- is entirely consistent with "due process of law." Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy

> trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim.

Id. at 145-46.

This holding was followed by the Seventh Circuit in *Lewis v. O'Grady*, 853 F.2d 1366 (7th Cir. 1988), where plaintiff was arrested on a valid warrant issued for another person. *Id.* at 1367-68. The plaintiff was imprisoned for eleven additional hours after a judge determined that he was not the man named in the warrant. *Id.* at 1368. He sued the Sheriff (and others) for false arrest and imprisonment, based on that eleven-hour delay. *Id.* Although the Seventh Circuit ruled that the district court erroneously had granted a directed verdict for the Sheriff--because in the circumstances the reasonableness of the eleven-hour delay in releasing him was for the jury to determine--it "recognize[d] that the administrative tasks incident to a release of a prisoner from custody may require some time to accomplish -- in this case perhaps a number of hours. Reasonable time must be allowed for such matters as transportation, identity verification, and processing. It is virtually impossible to establish an absolute minimum time to meet all potential circumstances which might exist." *Id.* at 1370.

To the extent Brass's claim rests on the County's policy or custom of not starting to process a particular day's releases until it has received all information, including wants and holds, relating to the prisoners scheduled for release, we cannot say the County

thereby violated Brass's constitutional rights. To the contrary, we think that that aspect of the County's release program was justified and reasonable in light of the County's problems and responsibilities in processing the large number of prisoner releases it handles.

In dismissing this case, the district court relied significantly on the fact that the 39-hour delay here was less than the 48-hour delay that the Supreme Court had sanctioned in *County of Riverside v. McLaughlin*, 500 U.S. 44, 58-59, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991).

McLaughlin involved the permissible delay between a warrantless arrest and a probable cause determination. The Court there stated: "In *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), this Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. This case requires us to define what is 'prompt' under *Gerstein*." 500 U.S. at 47. The Court stated that "some delays are inevitable" where jurisdictions "incorporate probable cause determinations into other pretrial procedures . . . . [T]here will be delays caused by paperwork and logistical problems. Records will have to be reviewed, charging documents drafted, appearance of counsel arranged, and appropriate bail determined. On weekends, when the number of arrests is often higher and available resources tend to be limited, arraignments may get pushed back even further." *Id.* at 55. The Court concluded:

> a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges.

> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

Id. at 56-57.

The Court's ruling that a judicial determination of probable cause within 48 hours of arrest generally will pass constitutional muster reflects the reality that "some delays are inevitable," such as those "caused by paperwork and logistical problems." *Id.* at 55. For that reason, the Court concluded that "the Fourth Amendment permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system." *Id.*

As shown above, similar "delays are inevitable" "while the

police cope with the everyday problems of processing" the County's release of a large number of prisoners. See also *Streit*, 236 F.3d at 556. It therefore appears that "the Fourth Amendment [and the Fourteenth Amendment] [similarly] permit[ ] a reasonable postponement" of a prisoner's release "while the [County] cope[s] with the everyday problem of processing" the release of the large number of prisoners who pass through its incarceration system. See *McLaughlin*, 500 U.S. at 55.

It is unclear, however, whether the 48-hour period applied to probable cause determinations is appropriate for effectuating the release of prisoners whose basis for confinement has ended. One might conclude that when a court orders a prisoner released -- or when, for example, a prisoner's sentence has been completed -- the outer bounds for releasing the prisoner should be less than 48 hours. We need not determine that question here, however, since we have concluded that in the circumstances of this case, the 39-hour delay in releasing Brass was reasonable and did not violate his constitutional rights.

AFFIRMED.

Not For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUL 01 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ROGER BRASS, Plaintiff - Appellant, v.	No. 01-57249
COUNTY OF LOS ANGELES, erroneously sued as Los Angeles County Board of Supervisors; RICK THURLO, individually and as a peace officer, Defendants - Appellees.	D.C. No. CV-98-02052-LGB ORDER

Before: **FRIEDMAN,* KOZINSKI** and **RAWLINSON,** Circuit Judges.

The petition for rehearing and the petition for rehearing en banc are DENIED. Fed. R. App. P. 35; Fed. R. App. P. 40. The motion for permission to file briefs of amici curiae in support of appellant's petition for rehearing is also DENIED.

* The Honorable Daniel M. Friedman, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROGER BRASS, Plaintiff, V. COUNTY OF LOS ANGELES, ET AL., Defendants.	CV 98-2052 LGB (AIJx) ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION; ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION

1. INTRODUCTION

The instant case arises from Plaintiff's arrest, booking, and detention in 1997. On February 3, 1999, this Court granted Defendants Sheriff Deputy Rick Thurlo ("Thurlo") and the County of Los Angeles ("the County") summary judgment on Plaintiff's Section 1983 causes of action and declined to exercise supplemental jurisdiction over Plaintiff's fourth, fifth, and sixth state law causes of action. On March 19, 2001, the Ninth Circuit affirmed summary judgment as to Thurlo but reversed and remanded as to the summary judgment granted to the County on Plaintiff's Monell claim the

mandate was filed and spread on May 14, 2001. On May 17, 2001,this Court reasserted jurisdiction of the previously dismissed supplemental state law claims. Currently pending before the Court are Plaintiff's motion for summary adjudication ("Pl's Motion") and Defendants' motion for summary judgment or in the alternative, summary adjudication of issues on Plaintiff's First Amended Complaint ("Ds' Motion").

Plaintiff seeks an order granting summary adjudication that: (1) Defendants' failure to release him from custody on April 6, 1997 violated his Fourth and Fourteenth Amendment rights under Section 1983, (2) Defendants' failure to arraign him in the statutory period set forth in Cal. Penal Code § 825 violated his constitutional rights under Section 1983, (3) Defendants' failure to comply with the provisions of the stipulated judgment and mandatory injunction issued in Smith, v. Gates violated his due process rights under Section 1983, (4) the County's failure to "promptly" release him upon the judge's April 9, 1997 order violated his Fourth and Fourteenth Amendment rights and that this violation was caused by the custom and practice utilized by the County under Section 1983, (5) Defendants' failure to timely arraign him in contravention of Cal. Penal Code § 825 constitutes violations of California Constitution, Article I, Sections 7 and 13, (6) Defendants' failure to "promptly" release him in contravention of Cal. Penal Code § 4024 constitutes violations of California Constitution, Article I, Sections 7 and 13, and that (7) Defendants' violation of Cal. Penal Code § 825 gives rise to a false imprisonment claim.

Defendants argue that Thurlo is no longer a defendant in the case because he cannot be liable on any theory pursuant to this Court's February 3, 1999 Order ("February Order") and the Ninth Circuit's opinion affirming that portion of the February Order, and that the only Section 1983 cause of action before this Court is Plaintiff's Monell claim against the County pertaining to his detention from April 9, 1997 to April 11, 1997 in accordance with the Ninth Circuit opinion. Defendants seek summary judgment, or in

the alternative, summary adjudication on (1) Plaintiff's Monell claim against the County on the grounds that Plaintiff has failed to produce evidence to enable a reasonable jury to find in his favor and that Plaintiff's detention from April 9, 1997 to April 11, 1997 after a judge ordered his release is reasonable as a matter of law and (2) on Plaintiff's state law claims for constitutional violations, false arrest and imprisonment, and negligence based on collateral estoppel because of this Court's alleged finding that his arrest and detention were based on probable cause.

II. FACTUAL AND PROCEDURAL BACKGROUND

It is undisputed that the following facts were found by this Court in its February Order. On April 6, 1997, Thurlo allegedly went to Roger Brass's ("Plaintiff") home, looking for an individual with an outstanding warrant. Upon finding James Brass, Thurlo and James Brass left Plaintiff's home. Later, Thurlo called Plaintiff and asked him to come to the station. Upon arrival, Thurlo placed Plaintiff in a custody cell with his brother James. Plaintiff was informed that Thurlo was looking for a James Nichols ("Nichols"). Thurlo then booked Plaintiff. Plaintiff remained in custody until his release on April 11, 1997, even though a judge ordered is release on April 9, 1997. Thurlo did not oversee the detention of the Plaintiff after he was ordered released by a judge. P1's Separate Statement of Genuine Issues in Opposition to Ds' Motion for Summary Judgment ¶¶ 3-9.

On March 23, 1998, Plaintiff filed a complaint against the County. On June 4,1998, Plaintiff amended his complaint to add Thurlo as defendant. The complaint stated six causes of action: (1) violation of Plaintiff's due process rights under 42 U.S.C. § 1983 against both defendants, (2) violation of Plaintiff's Fourth Amendment Rights under 42 U.S.C. § 1983 against both defendants, (3) unconstitutional custom and practice under 42 U.S.C. § 1983 against the County, (4) violation of Article I, Sections 7 and 13 of the California Constitution against both defendants, (5) false arrest and imprisonment against both defendants, and (6) negligence against

both defendants. P1's First Amended Complaint. Defendants thereafter filed a motion for summary judgment, Plaintiff filed an opposition, and Defendants filed a reply brief.

On February 3, 1999, this Court granted summary judgment in favor of Defendants on Plaintiff's Section 1983 causes of action and declined to exercise supplemental jurisdiction over the fourth, fifth, and sixth state law causes of action, dismissing them from federal court without prejudice. February Order at 12. Judgment was entered on February 3, 1999, thereby terminating the case.

In the February Order, the Court emphasized that Plaintiff had clarified that his first cause of action for due process violations under 42 U.S.C. § 1983 arose from his detention from Wednesday, April 9, 1997 when a judge ordered his release, to April 11, 19}97, when he was released. February Order at 4. On this claim, the C&rt granted Thurlo summary judgment based on Plaintiff's failure to present evidence demonstrating that Thurlo oversaw his detention from April 9, 1997 to April 11, 1997, id. at 5, and granted the County summary judgment on the ground that it could not be held liable under Section 1983 on a vicarious liability theory. Id.

The Court granted summary judgment to Thurlo on Plaintiff's second cause of action, a Section 1983 claim asserting a violation of the Fourth Amendment, based on qualified immunity: "The Court finds that given the totality of the facts before Thurlo, he objectively possessed probable cause . . . .[B]ecause [Thurlo] complied with Fourth Amendment requirements governing arrests, qualified immunity applies to Thurlo for the arrest of Plaintiff." Id. at 10. On this second claim, this Court granted summary judgment to the County on the grounds that it cannot be held liable under a respondeat superior theory in a Section 1983 cause of action. Id. The Court noted that though Plaintiff complained that his arrest was unlawful partly because of the failure to follow proscribed booking procedures, the [Fourth] Amendment governs arrests, not location-specific, post-arrest booking procedures and that as such,

"whether Thurlo complied with (the] . . . County's booking procedures is irrelevant to the second cause of action." Id. at 10.

Plaintiff's third cause of action for Monell liability alleges that his unlawful detention from April 9, 1997 to April 11,1997 constituted an unconstitutional custom and practice of the, County under Section 1983. The Court granted summary judgment to the County on the grounds that the Sheriff of the County was state rather than a local policymaker pursuant to County of Los Angeles v. Superior Court, 1998 Daily Journal D.A.R. 13093. Id. at 11-12. The Court then declined to exercise jurisdiction over the remaining state law claims absent federal claims and therefore dismissed them without prejudice.

On March 19, 2001, the Ninth Circuit affirmed this Court's judgment in favor of Thurlo but reversed the judgment with regard to the County. Relying on Streit v. County of Los Angeles, 236 F.3d 552, 561 (9th Cir. 2001), the Ninth Circuit concluded that the Sheriff of the County acted for the County rather than the state in its management and oversight functions of the local jail and that as such, the County could be held liable for Plaintiff's delayed release. Brass v. County of Los Angeles; Rick Thurlo, No. 99-55570 * 4-5 (9th Cir. 2001).

The mandate spread on the Ninth Circuit's opinion on May 14, 2001 and thereafter, this Court reasserted jurisdiction over Plaintiff's state law claims by signing the parties' stipulation to that effect. Plaintiff and Defendants subsequently filed the instant motions.

III. LEGAL STANDARD AND ANALYSIS

A. Legal Standard

Rule 56 of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ;-) P. 56 (c) . Material facts are those that may affect the outcome of the case. See Anderson v. Liberty Lobby, Inc.,477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

The moving party for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) . Rule 56(e) of the Federal Rules of Civil Procedure requires that the party opposing the summary judgment motion "set forth specific facts showing that there is a genuine issue for trial" in its opposition papers.

Partial summary judgment or summary adjudication is an order deciding one or more issues in advance of trial and may be granted on the motion of either party for adjudication of particular claims and defenses. It is guided by the same legal standards as a motion for summary judgment. See Schwarzer et al., Federal Civil Practice Before Trial § 14:354(2).

B. Analysis

1. The Issues and Defendants Before this Court

Initially, it is important to point out what claims are before this Court and which parties are the proper defendants because Plaintiff and Defendants disagree over the scope of the dispute that is currently before the Court.

a. Claims in Plaintiff's Section 1983 Cause of

Action

In his papers pertaining to both Defendant's motion and his own motion, Plaintiff lists four bases for his Section 7983 cause of action. Apart from a Monell claim against the County pertaining to his detention from April 9, 1997 to April 11, 1997 after a judge ordered his release, Plaintiff argues the following three additional bases to support his Section 1983 action: Defendants' alleged failure to (1) timely arraign him during the period of April 6, 1997 to April 9, 1997, (2) to promptly release him after they found that his and Nichols' fingerprints and CII numbers did not match on April 6, 1997, and (3) to comply with the stipulated judgment and mandatory injunction promulgated in Smith, v. Gates. Defendants contend that Plaintiff is estopped from asserting these latter three claims as bases for Section 1983 causes of action, either because they are new or because they have already been rejected by this Court. Plaintiff counters that these claims were "fairly included in [his] original and First Amended Complaint" and points to portions of his First Amended Complaint for support. P1's Reply to Ds' Opposition to P1's Motion at 3. In addition, he states that though the Smith injunction and booking issue has already been addressed by this Court, this was done within the context of a qualified immunity inquiry rather than as a substantive due process violation. P1's Reply to Ds' Opposition to P1's Motion at 4.

The issue is not whether these three latter claims can be included in Plaintiff's complaint, but rather whether Plaintiff has ever asserted them. In the February Order, this Court noted that Plaintiff had clarified in his opposition papers to Defendants' previous motion for summary judgment that his due process cause of action arose from detention from April 9, 1997 when a judge allegedly ordered his release to April 11, 1997. February Order at 4. Morever, the February Order also specified that Plaintiff's second Section 1983 cause of action challenged the lawfulness of Plaintiff's initial arrest while his Monell claim alleged that the County utilized an unconstitutional custom and practice to release prisoners and that his rights were violated by such a custom and practice when he was detained from April 9, 1997 to April 11, 1997 despite a judge's order

to release him.

Final judgment was entered on the Court's grant of summary judgment in favor of both Thurlo and the County, thus terminating the case and allowing Plaintiff to appeal to the Ninth Circuit. The Ninth Circuit reversed the February Order only as to this Court's holding that the County was not liable on the Monell claim pertaining to Plaintiff's detention from April 9, 1997 to April 11, 1997, thus leaving intact this Court's findings that the County was not liable under Plaintiff's first two Section 1983 causes of action (for due process violations and unlawful arrest). Plaintiff's Monell cause of action against the County pertaining to his detention from April 9, 1997 to April 11, 1997 is the only viable federal claim before this Court. Plaintiff has never contested this Court's interpretation of the claims contained in his complaint, either in his motion for reconsideration with this Court or by raising the matter before the Ninth Circuit. In light of this, any additional claims that Plaintiff may have had in his Section 1983 causes of action have been waived.

b. Defendants

Plaintiff attempts to substitute Sheriff Deputies Katz, Knox, Maldonado, and the Carson Station Watch Commander for certain Doe Defendants by inserting their names in the caption of his motion and by making general allegations pertaining to them. The Court, however, finds the addition of these individuals who were not named parties prior to the Ninth Circuit's remand to be inappropriate. This is especially so, in light of the fact that Plaintiff has not even attempted to request leave from the Court to add new parties or to file an amended complaint. Plaintiff cannot take advantage of the Ninth Circuit's limited remand by now adding these new individuals to the litigation. Thus, the naming of these individuals as defendants and any allegations pertaining to them as named defendants are stricken.

Based on the foregoing, the Court finds that the County is the only defendant named in Plaintiff's sole viable federal cause of action, the Monell claim pertaining to his detention from April 9, 1997 to April 11, 1997, and that both Thurlo and the County are the only named defendants in Plaintiff's state law claims.

2. Plaintiff's Thirty-Nine Hour Detention after the Judge Ordered His Release and Plaintiff's Monell Claim

Plaintiff claims that the County violated his constitutional rights when it failed to release him from jail until April 11, 1997, even though a judge ordered his release on April 9, 1997 and that this constitutes an unconstitutional custom and practice of the County actionable under Section 1983. In their motion, Defendants argue that Plaintiff's claim is without merit because the 39-hour delay in his release was not only not per se unreasonable but was, in fact, reasonable as a matter of law. Ds' Motion at 9[1].

Utilizing Vanke v. Block, CV No. 98-4111 (C.D. Cal. 1998), Plaintiff seeks summary adjudication that the custom and policy by which inmates get released, as described in the declaration of Deputy Sneed submitted by Defendants, is unconstitutional. Sneed noted that it is

> not until each and every piece of paper received from all courts countywide has been interpreted, routed, and inputted into AJIS that it can be determined whether an inmate has received a release authorization. Even then, a check must be

[1] In the beginning of Ds' motion, they appear to make the argument that each and everyone of Plaintiff's claims, federal and state, are barred because the detention and arrest of Plaintiff was based on probable cause and a valid warrant. Ds' Motion at 2-3. In the body of their brief, however, they do not make this argument, at least with respect to Plaintiff's Monell claim.

made to ensure that no wants or holds have been placed against an inmate which would preclude his release.

Decl. of Sneed to Ds' Motion ¶ 5. Plaintiff argues that this is the practice preliminarily enjoined by the Vanke court for violating the Fourth Amendment against unreasonable seizures. Even assuming that Vanke has precedential value[2], this Court rejects Plaintiff's request to summarily adjudicate the unconstitutionality of the policy described in Sneed's declaration because he has failed to carry his burden of showing that this policy was actually applied to him in the instant case. Mere conclusory statements that this practice "caused [his] detention," without more, does not constitute evidence sufficient to establish a nexus between~;the "policy" and Plaintiff's detention. The constitutionality or unconstitutionality of the "policy" is irrelevant without a nexus to Plaintiff's detention. P1's Motion at 25. Plaintiff's motion for summary adjudication with regard to the unconstitutionality of the policy described in Sneed's declaration is DENIED.

Defendants seek summary judgment that Plaintiff's 39-hour detention from April 9, 1997 to April 11, 1997 is reasonable as a matter of law. Though unreasonable delay in releasing a person after he has a right to be released may constitute a constitutional deprivation, courts have recognized that the determination of the reasonableness of the delay entails the consideration of a number of factors including administrative steps to be taken, the number of people to be processed, transportation, booking and filing charges and paperwork. Lewis v. O'Grady, 853 F.2d 1366, 1370 (7th Cir. 1988). Such a multi-factored approach takes into account the fact that the administrative tasks incident to a release of a prisoner from

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[2] Vanke dealt with the issuance of a preliminary injunction and findings of fact and conclusion of law made in connection with a preliminary injunction are not binding adjudications. See Univ. of Texas v. Camenisch,, 451 U.S. 390, 395 (1981). At bottom, Plaintiff fails to distinguish between a court's preliminary findings of fact and the showing necessary to prevail on a motion for summary judgment or summary adjudication.

custody may require some time to accomplish. Id. In County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991), the Supreme Court held that "judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirements of [the Fourth Amendment). For this reason, such jurisdictions will be immune from systemic challenges." The Court, however, noted that "[t]his is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours"[3] .id. This is because such a hearing "may nonetheless violate [the Fourth Amendment] if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." Id.

Here, the parties agree that Plaintiff was detained for 39 hours from April 9, 1997 to April 11, 1997. Ds' Motion at 9; P1's Motion at 14-15. Thus, Plaintiff's detention is within the general 48-hour limit demarcated by the McLaughlin court and as such, is

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[3] Plaintiff argues that McLaughlin cannot be relied upon as authority for the proposition that waiting up to 48 hours to release inmates complies with constitutional promptness requirements because McLaughlin deals with the Fourth Amendment promptness requirements for probable cause determinations. This argument, however, has little merit in light of courts' recognition that the two situations are analogous. See Lewis, 853 F.2d at 1370 ("Both Moore, and Gramenos (and the majority of other cases) address the reasonableness of the delay between an arrest and either a release or an appearance before a magistrate. While this is somewhat different than the delay in administrative processing such as Lewis alleges, the cases are clearly analogous."); Fowler v. Block, 2 F. Supp. 2d 1268, 1278-79 (C.D. Cal. 1998) (plaintiff's delayed release of 24-48 hours due to administrative procedures cannot be per se unreasonable). Defendants argue that Fowler is no longer "good law" because it was reversed by the Ninth Circuit in an unpublished opinion. See Fowler v. Block, 1999 WL 413476 (9th Cir. 1999). However, Defendants fail to note that the Ninth Circuit reversed Fowler and remanded the case on procedural grounds only and did not vacate the district court's decision. See Fowler., 1999 WL 413476 * 1 ("In ruling that the courtroom deputies are not entitled to qualified immunity for detaining plaintiff at the Los Angeles County Jail, the district court effectively converted the courtroom deputy defendants' motion to dismiss into plaintiff's summary judgment motion. In so doing, the district court erroneously resolved material factual issues underlying the qualified immunity decision without providing defendants an opportunity to present responsive factual material."); Streit v. County of Los Angeles, 236 F.3d 552, 556 n.1 (9th Cir. 2001)
(noting that the Ninth Circuit reversed the district court's decision in Fowler on procedural grounds).

deemed to be reasonable and constitutional unless Plaintiff can prove that his release was delayed unreasonably. Plaintiff has submitted various exhibits including depositions from individuals not related to this instant action, newspaper articles, and sk force reports, which are irrelevant and which do not raise "a genuine issue of material fact as to the reasonableness of his detention.[4]

Because Plaintiff's 39-hour detention is within the presumptive constitutional time limit of 48-hours set by the McLaughlin court and because Plaintiff has not raised a genuine issue of material fact that his release was otherwise unreasonably delayed, Defendants' motion on Plaintiff's sole remaining Section 1983 cause of action alleging Fourth and Fourteenth amendment violations for overdetention is GRANTED.

3. Plaintiff's State Law Claims

Plaintiff's three remaining causes of action are state law claims. The fourth cause of action is for violations of the California Constitution, the fifth cause of action is for false arrest and imprisonment, and the sixth cause of action is for negligence. However, as in the February Order, the Court finds that having disposed of Plaintiff's federal claims before trial, it is appropriate to decline jurisdiction over these state law claims. See Schneider v. TRW, Inc. et al., 938 F.2d 986, 993-94 (9th Cir. 1991). The Court therefore DISMISSES Plaintiff's state law claims without prejudice.

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[4] Because Plaintiff has failed.. to produce any evidence sufficient to enable a reasonable jury to find in his favor, the Lewis, 853 F.2d at 1370, court's statement that "[w]hat is a reasonable time for detaining a prisoner in custody is a question best left open for juries to answer based on the facts presented in each case" does not apply here.

IV. CONCLUSION

Based on the foregoing, the Court GRANTS Defendants' motion for summary judgment on Plaintiff's remaining Section 1983 caus$ of action (Monell) and DENIES Plaintiff's motion for summary adjudication with regard to the unconstitutionality of the policy described in Sneed's declaration. The Court also DISMISSES Plaintiff's state law causes of action without prejudice.

IT IS SO ORDERED.

Dated: November 20, 200

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 03-505

In The

Supreme Court of the United States

ROGER BRASS,

Petitioner,

vs.

COUNTY OF LOS ANGELES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

DAVID J. WILSON
MANNING & MARDER
KASS, ELLROD, RAMIREZ LLP
660 South Figueroa Street
23rd Floor
Los Angeles, California 90017

(213) 624-6900
(213) 624-6999 Fax
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the routine jail procedures which caused incarceration of petitioner for 39 hours following a court's order for his release deprive him of a constitutionally protected interest? *Compare Brass v. County of Los Angeles*, 328 F.3d 1192 (9th Cir. 2003) (39-hour delay constitutional), *with Lewis v. O'Grady*, 853 F.2d 1366 (7th Cir. 1988) (delay of eleven hours may violate the Constitution).

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INTRODUCTION

The Los Angeles County Jail system is the largest county jail in the world. With a daily inmate population of over 20,000, the Jail system operates detention facilities throughout the 4000 square miles of Los Angeles County, including a central jail facility in downtown Los Angeles and smaller detention facilities in each of the 42 courthouses in the County. In addition, the Jail receives prisoners from numerous smaller detention facilities operated by city police departments within a county made up of over 80 cities with a population of over 9,000,000. On an average day, the Jail system processes in and out between 400 and 500 inmates.

Coordinating the records among all these different physical locations and different public entities requires time. Although the court system and the Jail system each are computerized, in 1997 communication between the two systems was by paper. Thus, when a court ordered a prisoner released, a written order was issued. At the end of the day, each courthouse gathered its orders and sent the paperwork to downtown Los Angeles for processing. Once the paperwork for each day was digested by the Jail system, it began processing out the inmates who were eligible for release.

Roger Brass asserts that his constitutional rights were violated in 1997 because 39 hours elapsed from the time a judge ordered him released on his own recognizance (to return three weeks later) and the time he actually reached the street. Petitioner, however, did not present any evidence that this amount of time was unreasonable, or that his release was intentionally or arbitrarily delayed by the County. The County presented evidence that its

1997 procedures were reasonable: it took an average of 24 to 48 hours to process out a prisoner, including processing the paperwork, getting the prisoners to the Inmate Reception Center in downtown Los Angeles, fingerprinting them, and physically releasing them.

Based on this evidentiary record, the trial court properly granted summary judgment, and the Court of Appeals properly affirmed. Petitioner argues that certiorari should be granted here because the decision of the Court of Appeals creates a conflict among the circuits, and the case presents the issue of whether a jailer can arbitrarily continue to hold a prisoner after a court orders the prisoner released. Neither argument, however, supports granting certiorari here.

First, the opinion in this case does not create a conflict among the circuits because the decision very clearly rests on the specific facts of this case, including Petitioner's failure to present evidence that the delay in his release was unreasonable. The opinion does not purport to establish any bright-line rule for all county jails in the United States. It does not, therefore, conflict with other decisions from other circuits.

Los Angeles County is the most populous county in the United States, and it has the largest county jail system. A standard that is appropriate for Los Angeles County may not be appropriate for smaller counties with fewer facilities and a smaller inmate population. The Court of Appeals properly looked at the facts of this case, and rejected the opportunity to establish a bright-line rule for all county jails across the country. Thus, there is no conflict among the circuits.

Second, the issue of whether a jailer can arbitrarily continue to hold a prisoner after a court ordered the prisoner released is not presented by the facts of this case. There is no evidence that Petitioner was treated any differently than any other prisoner, and no evidence that his release was delayed arbitrarily. Petitioner's paperwork was processed through both the court system and the jail system in the normal way, and he was released as soon as the process was completed.

Neither issue raised by Petitioner is a valid basis for granting certiorari in this case. The Court, therefore, should deny the petition.

STATEMENT OF THE CASE

In April 1997, petitioner Roger Brass was reasonably, though mistakenly, arrested on a bench warrant for James Nichols. Petitioner closely matched the physical description of Nichols, and lived at the address given for Nichols in the warrant. Both men are white, 5'9" or 5'10", with brown hair and hazel eyes, and close to the same age. Nichols is missing a finger on his left hand; Petitioner is missing three fingers on his left hand. When Petitioner was interviewed, he gave noncommittal and evasive answers when asked if he was James Nichols. Petitioner was fingerprinted, but the computer that handles fingerprint analysis went down before the deputy who was interviewing Petitioner received a response to his inquiry.

Petitioner was booked on the bench warrant, and on April 9, 1997 he was timely brought before a judge. When Petitioner appeared in court, he asserted that he was not the man sought by the bench warrant, but no fingerprint

evidence was available to the court at that time. The trial court, therefore, ordered Petitioner released on his own recognizance, and ordered him to return on April 29, 1997 for the presentation to the court of fingerprint evidence. Pet. App. A at 2. Petitioner was processed out of the Los Angeles County Jail, and was released on April 11, 1997.

Petitioner asserts that his constitutional rights were violated because he was not released fast enough. The district court granted summary judgment in favor of the County of Los Angeles on this claim, based on the evidentiary record demonstrating that the County's procedures are reasonable. Pet. App. C at 10-12. The district court also relied on Petitioner's failure to produce evidence that the time period between the order for his release and his actual release was unreasonable. *Id.* The Court of Appeals affirmed, also based on this evidentiary balance in favor of the County. Pet. App. A at 13-16.

REASONS TO DENY THE PETITION

1. There Is No Conflict among the Circuits Because The Court of Appeals Relied on *Lewis v. O'Grady* and Did Not Reject *Lewis'* Reasoning or Ruling

Petitioner asserts that the opinion of the Court of Appeals conflicts with *Lewis v. O'Grady*, 853 F.2d 1366 (7th Cir. 1988), because *Lewis* overturned the granting of a directed verdict on the grounds that the issue of reasonableness should have gone to the jury. On the contrary, the opinion relies in part on *Lewis*, so it does not create any conflict. Both the district court and the Court of Appeals found that petitioner had not presented sufficient evidence to create any genuine issue of fact that needed to be

submitted to a jury. This ruling does not conflict with *Lewis*.

Lewis involved a man who was mistakenly arrested on a warrant, and was administratively determined to be not the man sought by the warrant. *Lewis*, 583 F.2d at 1369 ("It is critical to note that Lewis was not judicially released or discharged but was set free only after certain administrative steps to verify his identity had been taken."). The Court held that a jury should decide whether the 11-hour delay after the administrative determination of the plaintiff's identity was reasonable for the Cook County Jail system. *Id.*, at 1370.

Any issue of reasonableness can be resolved at summary judgment where all the evidence points in only one direction. Here, the district court expressly noted that *Lewis* did not control because plaintiff did not "produce any evidence sufficient to enable a reasonable jury to find in his favor. . . . " Pet. App. C at 12, fn. 4. The Court of Appeals also cited *Lewis* with approval, and then ruled that the Los Angeles County Jail's policy of starting the release process after it has processed all the paperwork received from all the courthouses in a single day was reasonable. Pet. App. A, at 15-16.

The opinion in this matter does not conflict with any other circuit because it does not purport to establish a nationwide standard for the amount of time a county jailer may take to process out a prisoner who has been ordered released. The Court of Appeals specifically eschewed such a bright line rule:

> Brass may have had a due process right to be released within a reasonable time after the reason for his detention ended. [citation omitted] The

> question here, however, is whether the County denied him that right because its policy or custom of processing court-ordered releases only after it has processed all other releases increased by an indeterminate amount the delay between the court order and his actual release. [¶] . . . In these circumstances, we cannot say that to the extent that the 39-hour delay in releasing Brass resulted from that policy or custom, it violated his constitutional right to due process of law.

Pet. App. A at 13-14.

Nothing in the opinion in this case creates a conflict with *Lewis v. O'Grady*, or any other circuit court decision. The Court of Appeals expressly avoided establishing a bright-line time deadline for all jails. There is no basis for granting certiorari.

2. This Case Does Not Present the Issue of Whether a County Jailer Can Arbitrarily Delay Initiation of a Prisoner's Release

Petitioner also asserts that certiorari should be granted to determine whether a jailer can arbitrarily delay initiation of a prisoner's release from county jail. This issue is not presented by the facts of this case. There is no evidence that anyone at the Los Angeles County Jail arbitrarily delayed the initiation of Petitioner's release.

On the contrary, the evidence shows that in 1997, it took between 24 and 48 hours to process a prisoner out of the Los Angeles County Jail. Petitioner was released in 39 hours, well within this average window of time. Petitioner, moreover, has no evidence that the initiation of his release was arbitrarily delayed.

In any large organization, it takes time to execute a decision. The decision of the Los Angeles County Superior Court to release Petitioner on his own recognizance "for this case only" has to be communicated through the court system and through the jail system. The order regarding Petitioner was not the only order issued by the courts that day. Until the Jail was able to digest all the information it received from the courts that day, it was unable to start processing out Petitioner, or any other prisoner ordered released that day.

In digesting this information, the County checked to see that there was no other reason to hold Petitioner or any of the other prisoners who were ordered released in a specific case. The evidence showed that this was not an arbitrary delay. This is not a basis for granting certiorari.

CONCLUSION

For all the foregoing reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

DAVID J. WILSON
MANNING & MARDER
KASS, ELLROD, RAMIREZ LLP
660 South Figueroa Street
23rd Floor
Los Angeles, California 90017
(213) 624-6900
(213) 624-6999 Fax
Counsel for Respondent